IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3155 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAYABEN @ JAYSHRIBEN W/O RANJITSINH M. SOLANKI

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 3155 of 2004

MR NIRAV C THAKKAR for Petitioner No. 1

MS MITA S PANCHAL AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 21/04/2004

ORAL JUDGEMENT

The petitioner above named has preferred this petition under Article 226 of the Constitution of India

for appropriate writ, order or direction, for quashing and setting aside an order of detention dated 20/10/03 passed by respondent no.1 herein, in exercise of the powers u/s.3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short, "the said Act").

2. It was alleged against the petitioner that one offence was registered against him before Umara Police Station at C.R.No.658/2003 on 29/08/03 for offences punishable u/s.3, 4 and 5 of The Immoral Traffic (Prevention) Act, 1956. It was also alleged against the petitioner that two witnesses had given statements against him saying that he was engaged in bootlegging activities. On the strength of the aforesaid one registered offence and two statements of unnamed witnesses, the detaining authority found it necessary to detain the petitioner and accordingly, the impugned order of detention was passed against him.

3. Feeling aggrieved by the said order of his detention, the petitioner has preferred this petition before this Court. It has been contended here that the statements of the witnesses and of the petitioner herself could not have been considered by the detaining authority, in view of the provisions made in Section 162 of the Code of Criminal Procedure, 1973 as well as u/s.26 of the Evidence Act, 1872. That, simply because an offence has been registered against the petitioner, it could not be treated to be an act affecting public order. That, the statements of the witnesses have been considered but their names have not been disclosed to the petitioner, and therefore, the petitioner was not in a position to submit an effective representation against his detention. That, therefore, the order of detention is illegal and hence, it may be quashed and set aside.

4. On receipt of the petition, Rule was issued and in response to the service of notice of Rule, Ms.Mita S Panchal learned AGP has appeared on behalf of the respondents. I have heard the learned advocates for the parties and have perused the papers.

5. As said above, the petitioner has been detained on the ground that one offence as aforesaid was registered against her and two witnesses had rendered statements against the petitioner. The learned advocate for the petitioner has drawn my attention to the provisions made in Section 162 of the Cr.P.C.. It has been contended that the statement of the petitioner or of the witnesses could not have been taken into consideration by the detaining authority for the purpose

of passing the impugned order. Section 162(1) of the Cr.P.C. reads as follows;

Section 162(1) : "No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made;"

5.1 On a bare reading of this provision, it is very clear that the statement of any person made before a Police Officer during the course of an investigation cannot be taken into consideration or cannot be read for any purpose at an enquiry or trial in respect of an offence under investigation at the time when such a statement was made. Therefore, it is difficult to accept that the statements of witnesses and the statement of the petitioner could not be considered by the detaining authority for the purpose of passing an order of detention. Therefore, the said argument cannot be accepted.

5.2 Even with respect to the provision made in Section 26 of the Evidence Act, the detaining authority has considered the statement of the petitioner recorded by the police officer. However, there the petitioner was not an accused before the detaining authority and it has not been used as confession of crime against her. Therefore also, it would be difficult to accept the argument of the learned advocate for the petitioner that the statement made by the petitioner before the police officer could not be considered by the detaining authority for the purpose of passing an order of detention.

6. It has then been contended that a solitary offence was registered against the petitioner and therefore, he could not be treated to be an habitual offender. It is true that the petitioner herself has rendered her statement before the concerned police officer. Looking to the said statement and the case registered against the petitioner, it would be difficult to accept that the petitioner was a habitual offender in committing the aforesaid offence. When the person is not found to be habitually involved in an offence, then it

would be difficult to brand him/her as a "dangerous person" or a "bootlegger". In that view of the matter, it could be said that the detaining authority was not justified in passing an order of detention against the petitioner.

7. The detaining authority has also considered statements of two witnesses whose names have not been disclosed. The learned advocate for the petitioner has argued that the names of the witnesses were required to be disclosed and when the names were not disclosed, the petitioner was unaware about those names and hence, the petitioner could not submit an effective representation to the detaining authority or to the State Government.

8. The learned AGP contends that u/s.9(2) of the said Act, the detaining authority has a power of privilege to withhold the names of the witnesses from the notice of the petitioner. There is no dispute about the same. Before a right or power of privilege is claimed u/s.9(2) of the said Act, the detaining authority has to ascertain by appropriate inquiry that there is a genuine fear or apprehension in the minds of the witnesses on account of which they apprehend fear and therefore, their names were required to be kept away from the notice of the petitioner. In the present case, we find that the records do not show that there was credible material before the detaining authority in order to withhold the names of the witnesses from the notice of the petitioner. In absence of such materials on record, it cannot be said that the detaining authority was justified in withholding the names of those witnesses. Then it can be seen that without knowing the names of witnesses, the petitioner could not make an effective representation and hence, the right to make an effective representation under Article 22(5) of the Constitution of India has been denied. In that case, further continuance of the detention cannot be sustained. Therefore, on these counts, the order of detention is required to be quashed and set aside.

9. For the foregoing reason, this petition is allowed. The impugned order of detention dated 20/10/03 passed by respondent no.1 against the petitioner, is ordered to be quashed and set aside. Detenu, Jayaben Jayshriben w/o Ranjitsinh Mohansinh Solanki, is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute with no order as to costs. Direct service permitted.

(D. P. Buch, J.)

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